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In The
Supreme Court of the United States

SAMSON TAIWO DADA,

Petitioner,

v.

PETER D. KEISLER,
Acting United States Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN IMMIGRATION LAW FOUNDATION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND CATHOLIC CHARITIES COMMUNITY SERVICES, ARCHDIOCESE OF NEW YORK IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. The AILF Legal Action Center is a litigation and legal services program whose purpose is to assure the fair and just administration of immigration laws and policies. The Legal Action Center has written and published on its website and elsewhere practice materials addressing voluntary departure, its limitations, and consequences. *See infra* note 8. In addition, AILF appeared as *Amicus Curiae* in *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325 (11th Cir. 2006), and *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007), as well as several unpublished cases addressing the issue presently before the Court.

The American Immigration Lawyers Association (AILA) is a non-profit association of immigration and nationality lawyers and law school professors. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

11,000 members organized in 36 chapters across the United States, in Canada, and in Europe. AILA members regularly appear before federal courts throughout the United States. AILA's members' clients will be directly affected by the decision of this Court in this matter. In formal liaison meetings, AILA has urged the Executive Office for Immigration Review (EOIR) to adopt a policy of tolling the voluntary departure period upon the filing of a timely motion to reopen.

Catholic Charities Community Services ("Catholic Charities"), Archdiocese of New York, is a not-for-profit voluntary agency serving the Bronx, Manhattan, Staten Island, and the Lower Hudson Valley. It is part of the complex array of organizations that fall under the umbrella of Catholic Charities of the Archdiocese of New York. Catholic Charities provides low-cost and free counseling and legal representation to documented and undocumented immigrants. The office conducts direct representation in administrative interviews, hearings, and court proceedings, and its lawyers regularly appear before local United States District Courts and the Court of Appeals for the Second Circuit. Catholic Charities' clients will be directly affected by the decision of this Court in this matter.

SUMMARY OF ARGUMENT

Amici Curiae proffer this brief in support of Petitioner Dada and to assist the Court by illuminating the realities of voluntary departure. Those courts of appeals that would not toll the voluntary departure period to allow for a motion to reopen have presumed that voluntary departure is an arm's-length transaction between the government and the recipient. Their assumption reflects a misunderstanding of the actual benefits of voluntary departure and the "application" process itself. Specifically, the courts did not consider voluntary departure's limited and often illusory benefits or the lack of adequate notice to the recipient about its adverse consequences. Nor did these courts realize that tolling the voluntary departure period actually benefits the government and effectuates public policy goals.

First, the perceived primary benefit of voluntary departure – exemption from the inadmissibility bar for having been ordered removed – is not necessarily a benefit; many voluntary departure recipients are otherwise inadmissible to the United States despite the grant of voluntary departure. *See infra* Part I.A.1. Not only are the benefits illusory, but also many recipients of voluntary departure orders find themselves in the same or even worse situation than people ordered removed. *See infra* Part I.A.2.

Second, the statute and the regulations fail to ensure that individuals actually understand the requirements and consequences of voluntary departure.

See infra Part I.B. As a result, the notion that individuals knowingly agree to the terms of voluntary departure often is a fallacy.

Finally, tolling the voluntary departure period when a motion to reopen is filed does not adversely affect the government but rather provides real benefits. *See infra* Part II. Because motions to reopen must include completed applications and fees, and satisfy other requirements, and because the Board of Immigration Appeals (BIA) and immigration judges now adjudicate motions to reopen quickly, people have little cause to file motions to reopen for the sole purpose of delay. *See infra* Part II.A. Furthermore, allowing the adjudication of a meritorious motion to reopen is consistent with public policy, as expressed by Congress, the courts, and the Department of Justice. *See infra* Part II.B. The Court's analysis should be informed by all of these factors.

ARGUMENT

I. Voluntary Departure Is Not Necessarily an Agreed-Upon Exchange of Benefits.

Undergirding the issue before the Court is the assumption that voluntary departure is an "agreed-upon exchange of benefits" between an applicant and the government. *See* Respondent's Br. in Opp'n 8 (quoting *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-90 (5th Cir. 2006)); *Matter of Zmijewska*, 24 I&N Dec.

87, 92 (BIA 2007) (citing *Banda-Ortiz*, 445 F.3d at 389) (suggesting that "voluntary departure involves a quid pro quo arrangement between an alien and the Government of the United States"). In exchange for departing within a specified period of time at his or her own expense – a considerable benefit to the government – a person granted voluntary departure avoids being ordered removed. *See* 8 U.S.C. § 1229c(a)(1), (b)(1) (2007). Nonetheless, the reality is that in many cases, a person neither benefits from voluntary departure nor does he or she know and understand the terms, risks, and consequences of this alleged "benefit."

A. Voluntary Departure Does Not Necessarily Benefit the Noncitizen.

1. The Benefits Are Illusory

The benefit to the government is tangible and clear: voluntary departure expedites a person's departure from the United States and eliminates the expense of removing the person to a foreign country. *See, e.g., Chedad v. Gonzales*, 497 F.3d 57, 61 (1st Cir. 2007); *Thapa v. Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006). In contrast, in many cases, the "benefit" to the person "granted" voluntary departure is illusory. The result is a lopsided arrangement whereby conditions are imposed and the individual incurs serious adverse consequences, often without the person's advanced awareness or consent.

The primary anticipated benefit for the individual from voluntary departure is exemption from the legal consequences of a removal order. *See Chedad*, 497 F.3d at 61, 63 n.8 (calling the ability to re-enter "one of the main attractions of voluntary departure"); *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (describing the "specific benefit" of voluntary departure as "exemption from the ordinary bars to subsequent relief"); *Contreras-Aragon v. INS*, 852 F.2d 1088, 1090 (9th Cir. 1988) (en banc) ("most importantly, the grant of voluntary departure facilitates the possibility of return to the United States"); *see also Matter of Zmijewska*, 24 I&N Dec. at 92 (citing 8 U.S.C. § 1182(a)(9)(A)(ii) as an adverse consequence of a removal order). A person who is ordered removed is inadmissible to the United States for either five or ten years, depending on the manner of entry to the United States.[2] 8 U.S.C. § 1182(a)(9)(A)(i), (ii). Thus, voluntary departure "facilitates the possibility of return to the United States. . . ."[3] *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004) (cited in *Banda-Ortiz*, 445 F.3d at 390); *see also*

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[2] "Arriving aliens" generally are subject to a five-year bar, 8 U.S.C. § 1182(a)(9)(A)(i), whereas "other aliens," including individuals who initially entered with a visa or who entered without being admitted or paroled, generally are inadmissible for ten years from the date of admission. 8 U.S.C. § 1182(a)(9)(A)(ii).

[3] When a person is outside the United States, he or she may process his or her case at a United States Embassy abroad (consular process) in order to enter as a lawful permanent resident. *See generally* 8 U.S.C. §§ 1201-1202.

Contreras-Aragon, 852 F.2d at 1090 (noting that a person who leaves under a voluntary departure order may "return immediately").

However, in many, perhaps most, cases an exemption from the five- or ten-year bar in 8 U.S.C. § 1182(a)(9)(A) is meaningless because the individual otherwise is subject to a ten-year bar to admission to the United States pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II). Section 1182(a)(9)(B)(i)(II) provides that individuals who are unlawfully present in the United States for more than one year are inadmissible for ten years.[4] "Unlawful presence" is accrued when a person remains in the United States past an authorized period of stay or when a person is present in the United States without being admitted or paroled. 8 U.S.C. § 1182(a)(9)(B)(ii).

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[4] Congress added the unlawful presence ground of inadmissibility to the Immigration and Nationality Act (INA) through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 301, 110 Stat. 3009 (1996) (IIRIRA). Thus, prior to the enactment of IIRIRA, it was far more likely that a person would be able to return lawfully and quickly to the United States after departing voluntarily.

Although there is a statutory waiver of the unlawful presence bar, the waiver is available only to a narrow class of individuals who can show that the refusal to admit them will result in "extreme hardship" to a United States citizen or lawful permanent resident spouse, son or daughter. 8 U.S.C. § 1182(a)(9)(B)(v). The Attorney General has sole, unreviewable discretion to grant this waiver. *Id.*

Not surprisingly, many people who are eligible for voluntary departure have accrued more than one year of unlawful presence in the United States.[5] In fact, from what appears in the court record of six of the seven published circuit court cases addressing the question presently before this Court, each of those petitioners accrued more than one year of unlawful presence and would be subject to the inadmissibility bar described in 8 U.S.C. § 1182(a)(9)(B)(i)(II).[6] Petitioner Dada himself also may have accrued more than one year of unlawful presence. *See* App. to Pet. for

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[5] Voluntary departure is not available to everyone in removal proceedings. For example, persons who have been convicted of aggravated felonies – a widely encompassing category of offenses, 8 U.S.C. § 1101(a)(43) – are statutorily barred from voluntary departure. 8 U.S.C. § 1229c(a)(1), (b)(1)(C). Importantly, to be eligible for voluntary departure at the conclusion of removal proceedings, a person must have been physically present in the United States for one year prior to the service of the Notice to Appear. 8 U.S.C. § 1229c(b)(1)(A). Given this requirement, it is likely that many individuals eligible for voluntary departure at the conclusion of proceedings will have accrued more than one year of unlawful presence.

[6] *Banda-Ortiz*, 445 F.3d at 388 (entered without inspection eleven years prior to initiation of removal proceedings); *Chedad*, 497 F.3d at 59 (overstayed visitor visa by more than one year); *Azarte v. Ashcroft*, 394 F.3d 1278, 1280 (9th Cir. 2005) (entered without inspection more than nine years prior to initiation of removal proceedings); *Dekoladenu v. Gonzales*, 459 F.3d 500, 502 (4th Cir. 2006) (overstayed visitor visa by more than one year before applying for asylum); *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325, 1326 (11th Cir. 2006) (overstayed visitor visa by more than one year); Brief of Petitioner at 5, *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (No. 04-1365) (overstayed visitor visa by more than one year).

Cert. 8 (describing how Mr. Dada overstayed his nonimmigrant visa for more than one year before his wife filed an immigrant petition on his behalf). Therefore, even if Mr. Dada were to depart within the voluntary departure period, he would be subject to a ten-year bar to reentering the United States.

Thus, the presumed primary benefit of voluntary departure – relief from the future legal consequences of a removal order – very often is not a benefit at all. Although the government cites additional benefits to the applicant, namely the ability to make arrangements without the threat of custody, to select the destination of departure, and to avoid the stigma associated with forced removal,[7] these benefits also often are illusory. Many individuals under voluntary departure orders are detained throughout the departure period.[8] Therefore, there is no reason to believe

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[7] Respondent's Br. in Opp'n 9. *See also Lopez-Chavez*, 383 F.3d at 651 (stating that voluntary departure allows people "to put their affairs in order without fear of being taken into custody at any time"); *Banda-Ortiz*, 445 F.3d at 390 (same).

[8] *Amicus Curiae* AILA has raised the issue of detention following the grant of voluntary departure in liaison meetings with the Department of Homeland Security (DHS). *See* App. 2 (discussing DHS' cooperating with detained individuals ordered to depart voluntarily to ensure that detention does not prevent them from timely departing through no fault of their own); App. 3-4 (raising concerns about individuals taken into custody when voluntary departure was the sole form of relief requested); *see also* Andrea Acosta, *ICE Detention Exceeds Legal Limit: Mother Pleads for Her Son's Release*, New American Media, May 24, 2007, *available at* http:/news.newamericamedia.org/news/view_article.html?article_id=031cdb0caac2578f22e5fa31061a8d87 (detailing DHS'

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that accepting voluntary departure means avoiding the fear of being taken into custody or having the opportunity to put one's affairs in order prior to leaving the United States. Likewise, the statement that voluntary departure allows a person to "select" the destination of departure is misleading; a person's destination options are limited to countries that will allow him or her to enter.

2. The Consequences of Failing to Voluntarily Depart Can Be More Severe than the Consequences of Removal

In addition to the illusory benefits of voluntary departure, noncitizens ordered removed often have more and better options to regularize their status and

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detention of a person granted voluntary departure) (last visited Nov. 4, 2007).

In addition, in June 2003, Glen A. Fine, Inspector General of the Department of Justice, testified before Congress that following September 11, 2001, the former Immigration and Naturalization Service (INS) detained hundreds of noncitizens, including those with voluntary departure orders, and did not permit them to leave the United States. *See The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (statement of Glen A. Fine, Inspector General, Dept. of Justice before the Sen. Comm. on the Judiciary) (June 25, 2003), *available at* http://www.usdoj.gov/oig/testimony/0306.htm.

suffer fewer penalties than those "granted" voluntary departure.[9]

Specifically, the INA provides penalties for failure to depart within the time specified for voluntary departure. 8 U.S.C. § 1229c(d). Those penalties include ineligibility for ten years for adjustment of status, cancellation of removal, voluntary departure, and other relief from removal. *Id.* The INA does not provide any such penalties for a person who was ordered deported but did not leave the United States.[10] Consequently, noncitizens who were ordered removed, but who did not leave the United States, remain eligible for relief and may seek reopening. 8 U.S.C. § 1229a(c)(7).

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[9] *Amicus Curiae* AILF has long warned immigration attorneys about the consequences of voluntary departure, particularly in comparison to the consequences of a removal order. *See* AILF Practice Advisory, *Failure to Depart After a Grant of Voluntary Departure: The Consequences and Arguments to Avoid Them* (February 21, 2006), *available at* http://www.ailf.org/lac/lac_pa_022106.pdf (superseding earlier versions of the practice advisory). AILF Practice Advisories are intended for use by attorneys, and an explanation of this intent is provided on AILF's website. *See* AILF Legal Action Center Practice Advisory Home Page, *available at* http://www.ailf.org/lac/lac_pa_index.shtml (stating that "AILF's Practice Advisories are intended to assist immigration lawyers" and "do not substitute for individual legal advice supplied by a lawyer familiar with a client's case").

[10] The legal consequence of having been ordered deported, i.e., inadmissibility to the United States for five or ten years, is not triggered until the person leaves the United States. 8 U.S.C. § 1182(a)(9)(A).

Significantly, even if the person remains in the United States for months or even years after the entry of a removal order, the government can and sometimes does agree to the motion to reopen, even though the motion is long out of time.[11] 8 C.F.R. §§ 1003.2(c)(3)(iii) and 1003.23(b)(4)(iv).[12] The BIA and immigration judges also have authority to *sua sponte* reopen a case at any time. 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). Of course, the government will not stipulate to reopen and the immigration judge or BIA will not reopen *sua sponte* if the person is statutorily ineligible for the underlying relief because of a voluntary departure overstay, even if he or she is otherwise eligible and deserving.[13]

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[11] This process has the effect of exempting the motion to reopen from the 90-day filing period in 8 U.S.C. § 1229a(c)(7)(C)(i).

[12] *See also* Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel 7 (Oct. 24, 2005) ("Howard Memo"), *available at* http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122 (directing DHS attorneys to "strongly consider exercising prosecutorial discretion and join" an untimely motion).

[13] *See* Howard Memo 7 (DHS will join the motion only if the movant is "legally eligible to be granted that relief except that the motion is beyond the 90-day limitation"); Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel 2 (May 17, 2001), ("Cooper Memo"), *available at* http://www.aila.org/Content/default.aspx?docid=16962 (specifying that former INS would not join a motion to reopen if the person is ineligible for relief because he or she overstayed the voluntary departure period).

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This dichotomy between the consequences of a voluntary departure order and the consequences of a removal order is well illustrated in the recent BIA decision, *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). In *Matter of Diaz-Ruacho*, the BIA initially denied Mr. Diaz-Ruacho's motion to reopen, finding that he was ineligible for cancellation of removal because he had failed to depart under the voluntary departure order. *Id.* at 48. After Mr. Diaz-Ruacho filed a petition for review, the BIA vacated its earlier order, reconsidered, and concluded that his voluntary departure order was not valid. As there was no voluntary departure order, the BIA found that Mr. Diaz-Ruacho was not barred from applying for cancellation of removal and reopened his case. *Id.* at 51.

Even if a noncitizen ordered deported is physically removed from the United States, thereby effectuating the removal order, he or she may be in a better situation than a person who accepted voluntary departure but overstayed to await a decision on his or her motion to reopen. Specifically, a person who departed under an order of removal or while a removal order was outstanding will be inadmissible for

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Significantly, the former INS stated that one of the factors for deciding whether to join in an untimely motion to reopen is "the hardship to the alien and/or her [United States citizen] or [lawful permanent resident] family members if the alien were required to procure a visa through consular processing (including the potential applicability of section 212(a)(9) [8 U.S.C. § 1182(a)(9)] should the alien depart the United States[.])." Cooper Memo at 2-3.

five or ten years, respectively. 8 U.S.C. § 1182(a)(9)(A)(i), (ii). That person, however, is eligible to request permission to reapply for admission earlier than five or ten years. 8 U.S.C. § 1182(a)(9)(A)(iii). This means such a person could re-enter the United States as a lawful permanent resident after consular processing, based on a petition filed either by a United States relative or an employer, long before the expiration of the five- or ten-year inadmissibility bar under 8 U.S.C. §1182(a)(9)(A).

By contrast, if the running of the voluntary departure period is not tolled to allow a decision on a properly-filed, timely motion to reopen, a person who stayed in the United States to allow the BIA or immigration judge to make that decision is ineligible to become a lawful permanent resident (through adjustment of status) for ten years. There is no "waiver" or "permission to reapply" earlier.

B. The INA and Applicable Regulations Do Not Ensure That Noncitizens Knowingly Assume the Risks and Consequences of a Voluntary Departure Order.

The INA and regulations do not ensure that noncitizens are informed ahead of time of the limitations of voluntary departure and most importantly, the serious risks. Lower courts' decisions are premised on the assumption that the noncitizen knowingly accepted these risks. *See Banda-Ortiz*, 445 F.3d at

389-90 (noting that a voluntary departure applicant must agree to the terms); *Dekoladenu*, 459 F.3d at 506 (calling voluntary departure a "deal" in which applicant must give up certain rights). The reality often is entirely otherwise.

A large majority of people who appear before immigration judges are unrepresented. For example, in FY 2006, 65% of the total number of individuals who appeared in immigration court, or 210,705 of 323,845, did not have representation.[14] In these *pro se* cases, the noncitizen's knowledge of immigration law and removal proceedings may be limited to what the immigration judge is required to tell him or her.

The INA does not obligate the immigration judge to explain or ensure the noncitizen understands the risks of accepting voluntary departure. The voluntary departure statute requires only that "[t]he *order* permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection." 8 U.S.C. § 1229c(d)(3) (emphasis added). There is no requirement that the immigration judge provide notice of these consequences before issuing the order. This means that even a literate, English-speaking person in removal proceedings would have no way to know the risks and consequences of failing to timely

[14] *See* U.S. Department of Justice, Executive Office for Immigration Review *FY 2006 Statistical, Year Book* G1 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

depart until *after* he or she receives and reviews the court's written order.

Further, the written notice fails to provide a meaningful explanation of the consequences. Although the notice does say that remaining in the United States beyond the authorized period will result in the person being ineligible for several forms of relief, it lists the forms of relief using only the statutory terminology, such as "adjustment of status" and "change of status."[15] This notice does not explain,

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[15] The form notice says the following:

> You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A Below) for ten (10) years from the date of the scheduled departure. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.
>
> * * *
>
> A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:
>
> 1. Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
> 2. Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act;
>
> (Continued on following page)

in language that the person will understand, that ineligibility for "adjustment of status . . . in Section 245" means that the person will not be able to apply for legal status (permanent residence or a "green-card") based on an application filed by his or her United States citizen spouse. The real life consequences of voluntary departure are masked in legal terminology.

Moreover, the immigration judge's decision and order, with the written notice of the consequences of failing to depart timely, may be mailed to the individual after the hearing. *See* 8 C.F.R. § 1003.37.[16] In those situations, there may be no one to explain the

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3. Adjustment of status or change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

U.S. Dep't of Justice, Executive Office for Immigration Review, Immigration Judge Benchbook, Part. II, J-30 (2001) *available at* http://www.usdoj.gov/eoir/statspub/benchbook.pdf. *See also* C.A. App. 1 (Petitioner Dada's notice).

[16] 8 C.F.R. § 1003.37(a) provides:

> A decision of the Immigration Judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the Immigration Judge in the presence of the parties and a memorandum summarizing the oral decision shall be served on the parties. If the decision is in writing, it shall be served on the parties by first class mail to the most recent address contained in the Record of Proceeding or by personal service.

See also 8 C.F.R. §§ 1240.12(a) ("The decision of the immigration judge may be oral or written . . . ") and 1240.13(a) ("A written decision shall be served upon the respondent and the Service counsel . . . Service by mail is complete upon mailing.").

legal terminology, and no real way for the individual to understand what has happened or the consequences.[17]

The "application" process itself also fails to provide the applicant with any warning of the gravity of the decision to enter into a voluntary departure agreement. There is no form to apply for voluntary departure, as there are for other immigration applications. *See* 8 C.F.R. § 299.1 (listing forms for various applications including adjustment of status (I-485), asylum (I-589), and employment authorization (I-765)). Applicants must complete and sign these applications. *See* 8 C.F.R. § 1245.2 (requiring submission of adjustment application); 8 C.F.R. § 1208.3 (requiring submission of asylum application); 8 C.F.R. § 1240.20 (requiring submission of cancellation of removal application). The applications provide instructions that state the purpose of the application, describe the eligibility requirements, and when applicable, inform the applicant of penalties associated with seeking this relief.[18]

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[17] As revealed in Petitioner Dada's own case, even if the person later learns of the consequences, there is no procedure for "giving back" a voluntary departure order. Mr. Dada's motion to the BIA requested, among other things, to withdraw his voluntary departure order. Pet. App. 3. The BIA noted this request but did not otherwise address or resolve it. Pet. App. 3.

[18] *See, e.g.*, Form I-589, *available at* http://www.uscis.gov/files/form/I-589.pdf (describing the consequences for an applicant who submits a frivolous asylum application); Form I-485 Instructions at 9, *available at* http://www.uscis.gov/files/form/

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The voluntary departure "application process" is quite different. Noncitizens do not review, complete, or sign any application. The statute and regulations do not require them to affirm – either in writing or otherwise – that they understand the benefit of voluntary departure or have been informed of the conditions and consequences. The immigration judge is required only to determine whether they are eligible for voluntary departure before entering the order. 8 U.S.C. § 1229c(a)(1), (b)(1); 8 C.F.R. § 1240.26(b), (c).

Under this process, potential voluntary departure recipients have no way to know whether agreeing to accept this so-called "benefit" truly is beneficial. Making an informed decision necessarily would take into account, solely on the "benefit" side: whether they have accrued more than one year of unlawful presence that would bar them from admission to the United States even if they leave under a voluntary departure order; whether they are detained and likely to remain detained during the removal and/or voluntary departure period; whether imminent removal is likely; and whether they have options regarding the departure destination. On the "consequences" side, an informed decision necessarily would review and encompass all the adverse consequences for failure to timely depart.

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i-485instr.pdf (describing penalties for traveling outside the United States while the application is pending and for providing false information on the applications).

Because people ordered to depart voluntarily often are unrepresented and may not be informed of the consequences of failing to depart, either by an immigration judge or by written notice or an application form prior to imposition of the order, the person may be entirely unaware of the penalties. The lack of assurances that the recipient understands the risks and consequences of voluntary departure, combined with the illusory benefits, means that voluntary departure is not necessarily an arm's-length transaction, as presumed by courts and argued by Respondent.

II. The Government's Concern That Tolling Adversely Affects the Government Is Misguided.

A. Short Adjudication Timeframes Discourage Filing Solely for Delay.

Tolling does not deprive the government of the benefits of voluntary departure. *See* Respondent's Br. in Opp'n 12 (arguing that tolling the voluntary departure period would "substantially deny" benefits to the government). As discussed *infra*, immigration judges and the BIA adjudicate most motions to reopen in fewer than 60 or 90 days, respectively. These short adjudication timeframes and several other realities mean that tolling of the voluntary departure period does not effectively encourage frivolous motions to reopen or result in additional costs to the government.

In the past, filing a motion to reopen could result in a long delay, as the immigration courts and the BIA[19] often took months or even years to adjudicate cases. According to the BIA, by 2002 it was unable to "effectively and efficiently" adjudicate the cases before it, and as a result, a sizeable backlog developed. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878, 54878-79 (Aug. 26, 2002). EOIR, the administrative agency responsible for the immigration courts and the BIA, said that the backlog and lengthy delays "encouraged abuse of the system" because filing an appeal at the BIA would prolong the entry of a final decision. *See* U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet: BIA Restructuring and Streamlining Procedures (March 9, 2006) ("BIA Fact Sheet"), *available at* http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm.

To address this problem, in 2002 the BIA adopted "procedural reforms," which, *inter alia*, instituted adjudication deadlines. *See* 67 Fed. Reg. at 54896,

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[19] The motion to reopen must be filed at the adjudicatory body that last had jurisdiction over the case. BIA Practice Manual, § 5.2(a), App. K-1, *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm. For example, in Petitioner Dada's case, the BIA had denied his appeal of the original removal order. Thus the BIA last had jurisdiction over the case, and he properly filed his motion there. App. to Pet. for Cert. 3. A person who did not appeal the underlying removal order would file the motion with the immigration judge.

54903-04.[20] One of the newly implemented BIA reforms was a 90-day deadline for adjudicating the majority of cases.[21] 8 C.F.R. § 1003.1(e)(8)(i).

EOIR also implemented Case Completion Goals to expedite the adjudication of cases pending before the immigration courts.[22] Under the Case Completion Goals, immigration judges must try to adjudicate motions to reopen within 60 days.[23]

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[20] The adjudication timeframes originally were codified at 8 C.F.R. § 3.1(e)(8) (2003). This provision was later designated as 8 C.F.R. § 1003.1(e)(8). 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

[21] The BIA's regulations require the "prompt" entry of summary dismissals and other miscellaneous dispositions. 8 C.F.R. § 1003.1(e)(8). Cases assigned to a single BIA member must be completed within 90 days. 8 C.F.R. § 1003.1(e)(8)(i). Cases assigned to a three-member panel must be adjudicated in 180 days, *id.*, but three-member panel decisions are reserved only for "complex cases" that "deserve closer attention." 67 Fed. Reg. at 54880. The BIA allows exceptions in "exigent circumstances" or for resolution of an impending precedent decision or regulation. 8 C.F.R. § 1003.1(e)(8)(ii), (iii).

[22] *See* Memorandum on Case Completion Goals from Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge to all Immigration Judges and Court Administrators (April 26, 2002), *available at* http://www.aila.org/content/default.aspx?bc=8735|17026|9002.

[23] *Supra* note 21. At a March 22, 2006 liaison meeting between EOIR and AILA, EOIR confirmed that immigration judges continue to abide by the Case Completion Goals and that the goal for adjudicating motions to reopen is 60 days. EOIR/AILA Liaison Meeting 14-15 (March 22, 2006), *available at* http://www.usdoj.gov/eoir/statspub/eoiraila032206.pdf. EOIR also explained that immigration judges must receive waivers from their Assistant Chief Immigration Judge (ACIJ) if they

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In 2006, EOIR announced it had eliminated its backlog and reduced delays at the BIA. *See* BIA Fact Sheet. In petitioner Dada's case, for example, the BIA decided his motion to reopen in 69 days. *See* C.A. App. 21 (motion filed Dec. 1, 2005); App. to Pet. for Cert. 3 (BIA decision dated February 8, 2006).

EOIR's success in reducing adjudication times has had the corollary effect of minimizing the incentive for an individual to file a motion to reopen to delay departure. Additional strong disincentives are the required filing fee of $110 for the motion itself and the mandatory, stringent filing and content requirements for such motions.[24]

B. Public Policy Concerns Favor Tolling.

The government expresses concern that tolling while the BIA or immigration judge decides a motion

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cannot meet the goal. *Id.* ACIJs have "discretion" whether to grant waiver requests. *Id.*

[24] Motions to reopen must state new facts that will be proven at a hearing to be held if the motion is granted, and must be supported by affidavits and other evidentiary material. 8 U.S.C. § 1229a(c)(7)(B). A motion to reopen to apply for relief, such as adjustment of status or cancellation of removal, must be accompanied by the appropriate application and all supporting documentation. 8 C.F.R. §§ 1003.2(c)(1) and 1003.23(b)(3). The motion must be in English and all supporting documents must be translated and accompanied by a certificate of translation if they are not in English. 8 C.F.R. §§ 1003.2(g)(1) and 1003.23(b)(1)(i). The $110 filing fee is just for the motion itself. 8 C.F.R. § 1003.24(b)(1); 8 C.F.R. § 1103.7(b)(2). If the motion is granted, the person must pay the additional fee for any underlying application for relief. 8 C.F.R. § 1003.24(c)(2).

to reopen deprives it of the benefit of voluntary departure.[25] In fact, the opposite is true. If the immigration judge or BIA denies the motion or, ultimately, the underlying relief requested, but the person is permitted to depart voluntarily, the government avoids all removal expenses. Alternatively, if the immigration judge or BIA grants the motion, reopens the case, and ultimately grants relief from removal, such as adjustment of status or cancellation, the person is no longer removable and again the government has saved all removal expenses.

The government's position also ignores the public policy endorsed by the BIA and many circuit courts: allowing adjudication of meritorious claims when the applicant has United States citizen or lawful permanent resident immediate family members. The BIA adheres to the policy of allowing motions to reopen filed for adjustment of status based on a marriage to a United States citizen or a lawful permanent resident even if the visa petition still is pending. *Matter of Velarde*, 23 I&N Dec. 253, 257 (BIA 2002). In *Sidikhouya* and *Ugokwe*, both petitioners were seeking to reopen their cases in order to remain with their United States citizen spouses who could file petitions on their behalf. *Sidikhouya v. Gonzales*, 407 F.3d 950, 951 (8th Cir. 2005); *Ugokwe v. U.S. Atty. Gen.*, 453 F.3d 1325, 1327 (11th Cir. 2006). Likewise, in *Azarte*, the petitioners sought to reopen their case in order to remain

[25] Respondent's Br. in Opp'n 12 (citing *Dekoladenu*, 459 F.3d at 506).

lawfully in the United States with their United States citizen children. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1280-81 (9th Cir. 2005) (applying for cancellation of removal because of the hardship to their two United States citizen children).

These cases effectuate the public policy favoring preservation of these families.[26] Approximately one third of all "unauthorized" families in the United States are "mixed status," meaning that at least one parent is unauthorized and at least one child is a United States citizen. Jeffrey S. Passel, *The Size and*

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[26] This Court has emphasized Congress's commitment to family unity. *See Fiallo v. Bell*, 430 U.S. 787, 795 n.6, 806 (1977) (describing how legislators' creation of preference immigration status categories for certain family members showed a commitment to "the problem of keeping families of United States citizens and immigrants united," citing H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), and reflected "the underlying intention of our immigration laws regarding the preservation of the family unit," citing H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952)). *See also* H.R. Rep. No. 107-127 (2001) (statement of Rep. Issa) (stating that the intention of the Family Sponsor Immigration Act of 2001 was "to keep families together"). Congress has made this commitment explicit in the INA. *See* 8 U.S.C. § 1159(c) (providing that the Secretary of Homeland Security or the Attorney General may waive grounds of visa ineligibility for persons seeking adjustment of status as refugees " . . . to assure family unity, or when it is otherwise in the public interest"). Scholars also have recognized the importance of family unity as a policy underlying immigration law. *See, e.g.*, Stephen H. Legomsky, Immigration and Refugee Law and Policy 131 (2d ed. 1997) (stating that the 1952 Act established the first comprehensive set of family-based preferences and since then, "one central value that our immigration laws have long promoted . . . is family unity").

Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey, Washington, D.C.: Pew Hispanic Center, March 7, 2006, at 8, *available at* http://pewhispanic.org/files/reports/61.pdf. Of those, there are 1.5 million "mixed" families where all the children are United States citizens. *Id.* Tolling the voluntary departure period preserves the avenue for deserving people to remain in the United States lawfully and to support their United States citizen family members.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's brief, this Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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November 2007

Minutes of AILA N.E. Chapter Liaison Meeting with ICE, CBP & CIS, January 24, 2007 (Excerpt)

Present for Immigration & Customs Enforcement: Bruce Chadbourne, Field Office Director, Detention & Removal; Jim Martin, Deputy Field Office Director, Detention & Removal; Sal Briseno, Assistant Special Agent in Charge, Investigations; Greg Nevano, Group Supervisor, Investigations; Jim Nagel, Acting Assistant Special Agent in Charge, Investigations; Fred McGrath, Chief Counsel; Frank Crowley, U.S. Attorney's Office; Paula Grenier, Public Affairs Officer

Present for Customs & Border Protection: Nancy Gilcoine, Assistant Director, Border Security, Boston Field Office

Present for Citizenship & Immigration Services: Denis Riordan, District Director; Karen Ann Haydon, Assistant District Director; Henry Hanley, General Counsel

Present for AILA: Estelle Regolsky, Howard Silverman, Kerry Doyle, Laura Murray, Tjan, AILA/ICE liaisons; Brian T. O'Neal, AILA/CBP liaison; Robin O'Donoghue, CIS liaison & vice Chair, N.E. Chapter; Bennett Savitz, Chair-Elect, N.E. Chapter; Daniel Harrington, Secretary, N.E. Chapter

* * *

Immigration & Customs Enforcement (ICE)

* * *

25. DRO: How do you handle Voluntary Departure under safeguards? Assuming the person gives you his/her passport, is there anything else they have to do to cooperate? Are there special deportation officers to handle this? What do they do to ensure that the Voluntary Departure happens within the proper time frame? If the foreign national was not granted the statutory maximum of days for VD, will you extend the Voluntary Departure?

If it's voluntary departure and a passport is available, we don't have to do any notification to the country unless there's a treaty requiring that we notify them that someone's in custody. There is no particular officer – we use an assignment wheel. If the departure doesn't happen in the time frame and it's our fault we extend the time frame.

* * *

ICE Liaison Minutes (11/12/03)
Cite as "AILA InfoNet Doc. No. 03120243
(posted Dec. 2, 2003)"
AILA/BICE COMMITTEE MEETING (Excerpt)

Draft Responses of 2:00pm, meeting held in Washington, D.C.

At ICE Headquarters on November 12, 2003

Attendees:

ICE – Victor Cerda, Chief of Staff/ICE and Principal Legal Advisor, Barry O'Mellin, Acting Deputy ICE Counsel, Mike Neifach, Principal Legal Advisor's Chief of Staff/ICE

AILA – Palma Yanni, Denyse Sabagh, Kathleen Walker, Chuck Kuck, David Leopold, Gerry Rovner, Estelle Regolsky, Linda Kenepaske, Patricia Mattos, Jeanne Butterfield, Crystal Williams, Judy Golub

ICE STRUCTURE

* * *

A discussion ensued about the administrative delays being experiences [sic] when all parties agree to removal. Examples were given by the committee of three to four week delays or longer. Mr. Cerda indicated that they certainly did not support such delays and would try to look into the matter. He requested the Committee to provide A numbers of case examples. The committee will be soliciting such examples to be forwarded to Mr. Cerda and his deputy for potential action. Examples were also given as to the Hartford

project wherein the IJ had granted Voluntary Departure as the sole form of relief requested and the individual was then taken into custody.

Mr. Cerda did indicate that numerous detention options were being considered, even some type of parole arrangement in non-mandatory detention cases.

* * *